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No. 93-1841

Supreme Court, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1994

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FILED
DEC 6 1994
OFFICE OF THE CLERK

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL HISPANIC MEDIA COALITION, THE COMMUNICATIONS TASK FORCE, THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, THE AMERICAN HISPANIC OWNED RADIO ASSOCIATION, AND THE EMERGING TELECOMMUNICATIONS ENTREPRENEURS ASSOCIATION, IN SUPPORT OF RESPONDENTS

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28 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 5

Argument

I. CONGRESS HAS BROAD DISCRETION TO CONSIDER RACE AS ONE OF THE FACTORS PROMOTING THE FIRST AMENDMENT GOAL OF DIVERSITY OF VIEWPOINTS 5

II. AN ADMINISTRATIVE AGENCY DECISION WHICH FAITHFULLY IMPLEMENTS A CONGRESSIONAL MANDATE SHOULD BE AFFORDED THE SAME DEFERENCE AS THAT AFFORDED THE CONGRESSIONAL MANDATE 10

Conclusion 21

TABLE OF AUTHORITIES

	Page
Cases	
Associated Press v. U.S., 326 U.S. 1 (1945) ...	8
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	*passim*
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	11
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973)	12
FCC v. NCCB, 436 U.S. 775 (1978)	8
FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940)	15
FCC v. Schreiber, 381 U.S. 279 (1965)	19
FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981)	8
Fullilove v. Klutznick, 448 U.S. 448 (1980)	*passim*

	Page
K Mart Corp. v. Cartier, Inc., 486 U.S 281 (1988)	17
Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992)	9
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)	*passim*
Mistretta v. U.S., 488 U.S. 361 (1989)	12
Mobil Oil Exploration and Producing Southeast, Inc. v. United Distribution Companies, 498 U.S. 211 (1991)	18, 19
National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976)	17
National Broadcasting Co. v. United States, 319 U.S. 190 (1943)	18
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	14
NLRB v. Food and Commercial Workers, 484 U.S. 112 (1987)	17
O'Donnell Construction Company v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992)	6

	Page
Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)	2
Sullivan v. Everhart, 494 U.S. 83 (1989)	17
Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994)	7, 10
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	9
Yakas v. United States, 321 U.S. 414 (1944)	18

Administrative Decisions

Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978)	8

U.S. Constitution

U.S. Const., amend. I	5, 7
U.S. Const., amend. XIV	11, 12
U.S. Const., art. I, § 8, cl. 1	11
U.S. Const., art. I, § 8, cl. 3	11

	Page
Statutes and Regulations	
5 U.S.C. § 706	17
47 C.F.R. § 73.2080	2, 3
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)	13
Legislative Materials	
Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991)	13
Other Authorities	
Steven G. Breyer, *Judicial Review of of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986)	*passim*
Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785 (1984)	18
Louis Fisher, *Micromanangement by Congress: Reality and Mythology*, in *Foundations of Administrative Law* 248 (1994)	13

Page

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989) 19

Bernard Schwartz, *Administrative Law 3d ed.* 45 (1991) 18

Harry Shooshan and Erwin Krasnow, *Congress and the Federal Communications Commission: The Continuing Contest for Power*, 9 Hastings Comm. & Ent. L.J. 619 (1987) 13, 14

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INTEREST OF AMICI CURIAE

Each of the eight *amici* is a national, nonprofit organization actively participating on behalf of minority consumer or business interests in proceedings before the Federal Communications Commission ("FCC").

The Minority Media and Telecommunications Council ("MMTC"), formed in 1986, is an association of approximately one hundred lawyers, engineers and scholars who provide *pro bono* support to civil rights organizations in policy and rulemaking matters before the FCC. MMTC promotes FCC rules and private industry initiatives aimed at increasing opportunities for minorities to own media and telecommunications facilities.

The League of United Latin American Citizens ("LULAC"), the nation's largest Hispanic organization, is concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. Founded in 1929, LULAC has approximately 33,000 dues-paying members. Several of its local councils and state associations have been active since 1990 in challenges to the FCC license renewal applications of broadcasters who appear to be violating the FCC's broadcast equal employment opportunity rule, 47 C.F.R. § 73.2080 (1993) (the "EEO Rule").

The Office of Communication of the United Church of Christ ("OC/UCC"), founded in 1965, is an instrumentality of the United Church of Christ, a Protestant denomination of approximately 1.6 million members nationwide. OC/UCC was the first program of national scope aimed at promoting racial diversity in the mass media. Its pioneering work in integrating southern television stations led to the landmark ruling affirming the standing of listeners and viewers to participate in broadcast licensing proceedings. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). OC/UCC played an

instrumental role in developing the EEO Rule. It has participated in dozens of FCC proceedings over the past three decades as an advocate for minorities in the mass media and in telecommunications.

The National Hispanic Media Coalition ("NHMC"), founded in 1986, is an association of two dozen constituent organizations representing all facets of Hispanic American business, consumer, educational and cultural life. NHMC strives to stimulate employment and ownership opportunities for Hispanics in all mass media.

The Communications Task Force ("CTF"), founded in 1986, is an association primarily composed of African American lawyers and media professionals. CTF sponsors public policy forums aimed at expanding the public dialogue over minority opportunity in the media and telecommunications.

The National Association of Black Owned Broadcasters ("NABOB"), founded in 1976, is the trade association of African Americans who own radio and television stations. Virtually all of the approximately 200 African American owned broadcast stations, are affiliated with NABOB. NABOB conducts management training conferences for its members, encourages advertising and financial investments in African American owned stations, and seeks to protect the interests of African American broadcast companies.

The American Hispanic Owned Radio Association ("AHORA") was founded in 1991 to promote business opportunities for Hispanic American broadcasters. AHORA seeks to increase the number of Hispanic Americans in the broadcasting industry, promote the

interests of the Hispanic community of the United States, and protect the overall interests of the Hispanic American broadcasting industry. Virtually all of the approximately 100 Hispanic owned radio stations are affiliated with AHORA.

The Emerging Telecommunications Entrepreneurs Association ("ETEA"), founded in 1994, is the association of minority entrepreneurs who have won permits to construct FCC licensed facilities in the Interactive Video and Data Service (IVDS). ETEA seeks to develop economic and marketing support networks among minority IVDS operators, as well as encourage the FCC to provide economic opportunities for minority entrepreneurs in the interactive video services market.

Each of the *amici* is intimately involved in promoting congressionally mandated FCC policies which are designed to promote economic opportunity, competition and diversity of viewpoints. The standard for equal protection review of these programs is potentially at issue in this case. Thus, each of the *amici* is vitally interested in the Court's reaffirmation of its holding, in *Metro Broadcasting, Inc. v. FCC*,[1] that wide deference should be afforded Congress when it mandates race conscious policies designed to promote diversity.[2]

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1 497 U.S. 547 (1990).

2 This brief is filed pursuant to S. Ct. Rule 37.3 with the consent of the parties. The consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

The Court should leave undisturbed *Metro's* holding that intermediate scrutiny applies to judicial review of congressionally mandated, narrowly tailored, race conscious programs designed to promote diversity of media ownership. The Court should also reaffirm that the degree of deference afforded to an administrative agency which faithfully implements a congressional mandate is the same as the degree of deference afforded to Congress.

ARGUMENT

I. CONGRESS HAS BROAD DISCRETION TO CONSIDER RACE AS ONE OF THE FACTORS PROMOTING THE FIRST AMENDMENT GOAL OF DIVERSITY OF VIEWPOINTS

Petitioner apparently now concedes that five Justices in *Metro* agreed that intermediate scrutiny is the proper standard of review for programs which promote First Amendment values.[3] However, one

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3 *See* Petitioner's Brief at 29-30; *compare* Petition for Writ of Certiorari of Adarand Constructors, Inc. at 12-13 (suggesting that Justice Stevens did not endorse this aspect of *Metro* because his concurring opinion in *Metro* "demands that the reasons for racial classifications be 'clearly identified and unquestionably legitimate'", *quoting Metro*, 497 U.S. at 601 (opinion of Stevens, J.)). *See also* Brief *Amicus Curiae* of the Associated General Contractors of America, Inc. in Support of Petitioner at 8-9 (recognizing that *Metro* applied intermediate scrutiny).

amicus argues that *Metro* should be overruled because, *inter alia*, "it was decided only recently and is not the type of decision upon which ordinary people have placed reliance" and "there is reason to believe that some justices [sic] in the *Metro Broadcasting* majority might reconsider their positions in light of developing demographic and political trends."[4] If this Court intends to reconsider *Metro*, the following is respectfully offered in its defense.

In *Fullilove v. Klutznick*,[5] this Court correctly found that Congress had articulated a substantial governmental interest in redressing past discrimination.[6] The *Fullilove* Court directed that a standard approximating "intermediate scrutiny" should be applied in reviewing congressionally mandated, race conscious remedial programs for equal protection purposes.[7]

Metro is a sound example of the principle that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified."[8] In *Metro*,

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4 Brief *Amicus Curiae* of the Federalist Society, Ohio State University College of Law Chapter at 9, 16. *Amici* are among the "ordinary people" who have "placed reliance" on *Metro*.

5 448 U.S. 448 (1980).

6 *Id.* at 473.

7 *Id.* at 490.

8 *O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (concurring statement of Ruth Bader Ginsburg, J.).

the Court determined that the FCC's congressionally mandated minority ownership policies serve the important government interest in promoting diversity of viewpoints,[9] thereby justifying the application of an intermediate level of scrutiny similar to that authorized in *Fullilove*.

Metro's holding was respectful of the paramount governmental interest in promoting robust public discourse in a multicultural, democratic society. Viewpoint diversity is an important First Amendment goal because social and political consensus will emerge from the clash of diverse and often conflicting ideas and beliefs. Last Term, in *Turner Broadcasting System, Inc. v. FCC*,[10] this Court reaffirmed that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[11]

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9 *Metro*, 497 U.S. at 567-68.

10 114 S. Ct. 2445 (1994).

11 *Turner*, 114 S. Ct. at 2470.

In the electronic mass media, diversity is enhanced by governmental efforts to expand the public's access to the media in order to increase the variety of ideas and beliefs disseminated. In this way, the public interest is served because the public is better informed. *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).

Historically, ownership has been viewed as a primary determinant of program diversity.[12] Thus, a well accepted means of enhancing viewpoint diversity has been the development of structural, content-neutral regulations diversifying media ownership. *FCC v. NCCB*, 436 U.S. 775, 795 (1978).

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[12] *Metro*, 497 U.S. at 570-71. The Communications Act is premised on the vesting of the right to speak (creation, selection and editing of content) in the owner of the FCC-licensed facilities. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). Congress and the FCC have both found that minority interests and viewpoints are inadequately represented in the broadcast media. *Metro*, 497 U.S. at 588-592. That is why the FCC has implemented policies designed to assist minorities in owning broadcast stations. *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC2d 979, 980 (1978).

The *Metro* Court concluded that the FCC's minority ownership policies are substantially related to the achievement of the government's diversity goals.[13] The *Metro* Court deferred to Congress' finding that that the government's substantial interest in promoting viewpoint diversity is enhanced by the inclusion of previously underrepresented minorities in the ownership of the electronic media. The Court concluded that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective . . . ."[14]

Congress' mandate for the FCC's minority ownership policies was grounded by an empirical nexus between the race of the owner and the range of viewpoints presented[15] and was not the product of impermissible stereotyping of minority broadcasters or

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[13] *Metro*, 497 U.S. at 569.

[14] *Id.* at 567. *Cf. Wygant v. Jackson Board of Education*, 476 U.S. 267, 288 n. * (1986) (opinion of O'Connor, J.) ("[t]he goal of providing 'role models' . . . should not be confused with the very different goal of promoting racial diversity among the faculty.").

[15] *Metro*, 497 U.S. at 579-82 (citing research findings). *Compare Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) (Congress lacked empirical support for a finding that female ownership interests of broadcast facilities is related to the presentation of female viewpoints).

media consumers.[16] Moreover, the policies are content-neutral.[17]

This Court should not require strict scrutiny in evaluating narrowly tailored federal programs such as those in *Fullilove* or *Metro*, or the program under consideration in the instant case. No party or *amicus* has identified any events, occurring since *Metro* was decided, which would compel or even support a decision overruling *Metro*. Therefore, *Metro* should remain undisturbed.

II. AN ADMINISTRATIVE AGENCY DECISION WHICH FAITHFULLY IMPLEMENTS A CONGRESSIONAL MANDATE SHOULD BE AFFORDED THE SAME DEFERENCE AS THAT AFFORDED THE CONGRESSIONAL MANDATE

Petitioner argues that a federal agency's action should only be afforded the lesser degree of deference given the action of a state or local government in

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16 *Metro*, 497 U.S. at 579.

17 Content-neutral regulations "do not require or prohibit the carriage of particular ideas or points of view. They do not penalize [speakers] because of the content of their programming. They do not compel [speakers] to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave [speakers] free to carry whatever programming they wish on all channels not subject to [the regulations]." *Turner*, 114 S. Ct. at 2462. This definition also perfectly fits the policies approved in *Metro*.

City of Richmond v. J.A. Croson Co.[18] rather than the greater degree of deference afforded the action of Congress in *Fullilove* or *Metro*. This argument overlooks the important distinctions made by this Court in *Croson* between federal and state remedial power, and reflects a misunderstanding of the way in which federal agencies function.

Distinguishing between the Court's decisions in *Fullilove* and *Croson*, Justice O'Connor explained "that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."[19] The level of deference afforded Congress may also stem from "an amalgam of its [other] specifically delegated powers."[20] These powers include the authority to "provide for the . . . general Welfare" pursuant to Congress' spending power, U.S. Const., art. I, § 8, cl. 1; to take necessary and proper action to protect against inequities that have an effect on interstate commerce under the Commerce Clause, U.S. Const., art. I, § 8, cl. 3; and "'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."[21]

These constitutionally delegated powers extend to federal agencies. Petitioner, however, would have this

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18 488 U.S. 469 (1989).

19 *Croson*, 488 U.S. at 490.

20 *Fullilove*, 448 U.S. at 473.

21 *Fullilove*, 448 U.S. at 474-76.

Court treat federal agency actions implementing congressional directives like state or local actions executing state or local goals.

Petitioner's argument fails to recognize the close relationship between Congress and administrative agencies. As this Court has noted, "[i]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. U.S.*, 488 U.S. 361, 371-372 (1989).

Agency decisions implementing congressional mandates that implicate but do not run afoul of the Fourteenth Amendment should be construed as any other agency decision should: as part of Congress' plan to achieve Congress' goals.[22]

Systematic safeguards assure that agencies interpretations, statutory administration, and decisions implement congressional goals. Congress' oversight of agency actions is expansive, and begins with Congress' power to amend or repeal a statute if it finds that an agency's implementation of the statute is unsatisfactory. Another "common form of congressional control over regulatory agencies is for the appropriations committees to incorporate policy directives and

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[22] In *Fullilove*, this Court recognized that courts should afford "'great weight to the decisions of Congress' even . . . when a congressional program raises equal protection concerns." *Fullilove*, 448 U.S. at 472 (*quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973) (Part I, Burger, J.) (citations omitted).

restrictions in the official reports accompanying appropriations bills."[23] Congress also controls agencies' execution of the laws through hearings,[24] committee investigations, studies by the General Accounting Office, informal contacts between members of Congress and agency officials,[25] and nonstatutory controls.[26]

Congress frequently passes legislation that nullifies initiatives taken by regulatory agencies."[27] In the context of the Federal Communications Commission, for

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[23] Harry Shooshan and Erwin Krasnow, *Congress and the Federal Communications Commission: The Continuing Contest for Power*, 9 Hastings Comm. & Ent. L.J. 619, 626 (1987).

[24] Louis Fisher, *Micromanangement by Congress: Reality and Mythology*, in *Foundations of Administrative Law* 248, 251 (1994). For example, Congress held hearings aimed at insuring that the FCC would act more decisively to facilitate the entry of new programmers into the cable television industry, so as to increase the number of media voices available to consumers. *See* Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991). These hearings were instrumental in the development of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[25] *See* Steven G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 368 (1986) ("Breyer") (an agency's "staff, in close contact with relevant legislators and staffs, likely understands current congressional views . . . .").

[26] Fisher, *supra* n. 24, at 251.

[27] Shooshan and Krasnow, *supra* n. 23, at 621.

example, "Congress has increasingly resorted to statutory moratoriums, as well as periodic authorizations and riders to appropriations bills, to block or reverse an unusually large number of major FCC decisions."[28] Further, any agency action interpreting a silent or ambiguous issue in a congressional enactment must be "appropriately limited in extent and duration and subject to reassessment and reevaluation by the Congress."[29]

Metro illustrates the close relationship between Congress and agencies which affords agencies congressional deference. Congress' appropriations

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[28] Shooshan and Krasnow, *supra* n. 23, at 619-620. Another example of using legislation to preempt unwanted statutory interpretation was Congress' passage of legislation in 1974 "that barred the Department of Transportation from proceeding with its proposal to require an ignition interlock system." *Id.* at 621 n. 8.

[29] *Metro*, 497 U.S. at 594 (*quoting Fullilove*, 448 U.S. at 489). *See* Breyer, *supra* n. 25, at 368 ("Congress' reenactment of the statute, in the face of an agency interpretation, is also some evidence that the agency's interpretation is correct; or at least it suggests that the agency's interpretation does not radically violate current congressional expectations . . . .") (*quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

decisions,[30] hearings,[31] and monitoring mechanisms[32] regarding the FCC's use of the minority preference system comprised a system of oversight sufficient to assure that the FCC implemented congressional goals. The Court recognized that Congress would "be able to further tailor the program based on [the] information" received from congressional monitoring mechanisms and that Congress "may eliminate the preferences when appropriate."[33] This Court did not make a distinction between the FCC implementation of the minority preference system and the congressional directive that mandated the system because Congress determined

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[30] This Court noted that congressional "appropriations legislation expressed its unqualified support for the minority ownership policies and instructed the Commission in no uncertain terms that in Congress' view there was no need to study the topic" of reversing the minority ownership policies for that year. *Metro*, 497 U.S. at 577 n. 29.

[31] "Congress has continued to hold hearings on the subject of minority ownership." *Metro*, 497 U.S. at 594.

[32] "Congress instructed the Commission to 'report annually on the effect of the preference system and whether it is serving the purposes intended.'" *Metro*, 497 U.S. at 595. Further, the Congressional Research Service prepared a report regarding minority broadcast ownership to inform the Senate of issues involving the minority ownership policies. *Metro*, 497 U.S. at 578.

[33] *Id.* at 595. As Mr. Justice Frankfurter has pointed out, "Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 146 (1940).

that the FCC's interpretation bore "the imprimatur of longstanding Congressional support and direction."[34] This Court decided that it "must give great weight" to Congress' and the FCC's "*joint determination*" of the means necessary to promote broadcast diversity.[35]

Failure to afford the same degree of deference to agencies permissibly implementing congressional directives would contravene the policies underlying *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[36] For a unanimous Court in *Chevron*, Justice Stevens explained that "if a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is

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34 *Metro*, 497 U.S. at 600.

35 *Id.* at 579 (emphasis added).

36 467 U.S. 837 (1984).

based on a permissible consruction of the statute."[37] *Chevron* clarified that agencies may interpret a broad congressional delegation to give a statutory directive substantive meaning.

This Court has faced numerous situations where an agency's interpretation of an ambiguous phrase added

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37 *Id.* at 843. *See also Sullivan v. Everhart*, 494 U.S. 83, 89 (1989) (Scalia, J.); *id.* at 103 (Stevens J., dissenting). To be "permissible" within the meaning of *Chevron*, the agency's interpretation of a statute is "rational and consistent with the statute", *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987), and "not in conflict with the plain language of the statute", *K Mart Corp. v. Cartier, Inc.*, 486 U.S 281, 292 (1988). "The word 'permissible' [may be read to be] general enough to embody the range of relevant factors." Breyer, *supra* n. 26, at 373. The Administrative Procedure Act, 5 U.S.C. § 706 (1976), provides that "the reviewing court [is to] decide all relevant *questions of law* [and] interpret constitutional and statutory provisions" (emphasis supplied). Thus, the question for the Court to determine in judging permissibility is partially whether "the particular question [is] one that the agency or the court is more likely to answer correctly . . . ." Breyer, *supra* n. 25, at 370. Micromanagement decisions of agency administration are best left to the agency.

Whether an "agency has special expertise to bear" on either a legal or policy question should weigh heavily towards a permissibility ruling." Breyer, *supra* n. 25, at 370 ("courts will defer more when the agency has special expertise that it can bring to bear on the legal question.") An agency such as the FCC, with a high degree of expertise in communications, should be afforded a high degree of deference. Indeed, "[t]he fast moving nature of communications technology, and the loose language of the [Communications Act], provide some basis for believing that Congress intended to allow the FCC a wider latitude than it typically granted to other agencies." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 618 n. 98 (D.C. Cir. 1976).

substantive meaning to the minimum set by Congress.[38] No differentiation has been made between an agency's permissible interpretation of a statute and the actual congressional enactments because "Congress . . . exercise[s] the primary legislative function, the administrative agency a secondary one."[39]

Thus, any function an administrative agency serves is subordinate to Congress' power.[40] Congress is

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[38] Since 1935, "Congress has delegated agencies vast powers under statutes written in the broadest possible language. The FTC can stop business practices that are 'unfair.' The ICC sets 'reasonable' rates; the FCC simply acts to serve 'public convenience, interest or necessity.'" Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785, 788 (1984) (footnotes omitted). *See National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (the FCC has the authority to administer an elaborate radio licensing scheme implementing Congress' directive to promote the "public interest"); *Yakas v. United States*, 321 U.S. 414, 423 (1944) (the Price Administrator has the authority to fix prices in a flexible manner under Congress' directive to establish such maximum price or prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Emergency Price Control Act); *Mobil Oil Exploration and Producing Southeast, Inc. v. United Distribution Companies*, 498 U.S. 211, 224 (1991) (the Federal Energy Regulatory Commission had the authority to raise the price ceiling for gas under the Natural Gas Policy Act despite the absence of a set maximum price ceiling).

[39] Bernard Schwartz, *Administrative Law 3d ed.* 45 (1991).

[40] "Any power delegated by Congress is necessarily a subordinate power because it is limited by the terms of the delegating statute." Schwartz, *supra* n. 39, at 45.

intimately engaged in controlling the development and implementation of agency goals and programs, and it never relinquishes its control. Failure to afford agencies the same level of deference as that afforded Congress would ignore that connection.

Agency decisions should be reviewed under the same standard as congressional actions because the benefits that accrue from allowing Congress to grant agencies discretion would otherwise be lost.[41] Granting agencies discretion permits flexibility[42] and political

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[41] *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) (judicial deference to agency determinations "is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the pecularities of the industry and the tasks of the agency involved.") *See generally* Breyer, *supra* n. 25, at 368 (one reason courts afford agencies deference is that "the agency knows more about the particular area of law than does the court."). *See also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989) (agencies have an "intense familiarity with the history and purposes of the legislation at issue [as well as a] practical knowledge of what will best effectuate those purposes.")

[42] *See Mobil Oil*, 498 U.S. at 224 ("Congress clearly meant to preserve the pricing flexibility" by leaving the ceiling price open). Agency interpretations of ambiguous phrases allow one phrase to "mean a range of things . . . in light of [the agency's] advancing knowledge [and] in light of the changing political pressures [the agency] feels from Congress . . . ." Scalia, *supra* n. 41, at 517 (internal parenthesis omitted). If agencies are not afforded the deference given Congress, they will be limited in their ability to continuously work with Congress to develop statutory aims.

participation[43] in the administrative process. Consequently, to sustain these benefits to the administrative system, deference to Congress should include deference to agencies acting under congressional direction.

If Congress has validly delegated authority to an agency, and the agency has acted within the scope of that authority, then the agency's action should be treated as Congress' action. Agency actions such as those in *Fullilove*, *Metro* and the instant case are entitled to deference because of the close relationships between Congress and the agencies, the congressional oversight ensuring that Congress' goals are implemented and the scope of Congress' delegations not exceeded, and the benefits of maintaining the flexibility inherent in *Chevron*.

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43 "[A]n agency to which Congress has delegated policymaking responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ." *Chevron*, 467 U.S. at 865. Justice Scalia states that political accountablity is "assured through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight." Scalia, *supra* n. 41, at 518.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 6, 1994

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* *Amici* recognize and appreciate the valuable assistance provided them by Virginia Marshall, Esq. and Rosalind Parker, Esq.; by Angela Moore, a student at Georgetown University Law Center; by Evelyn Rodriguez and Ayesha Nelson, and by several MMTC volunteer attorneys.